UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

MJK Clearing, Inc.,

Debtor.

BKY. No. 01-4257 (RJK)

OPPOSITION TO TRUSTEE'S MOTION FOR SANCTIONS

James P. Stephenson, Trustee, for MJK Clearing, Inc.,

Plaintiff,

vs.

Leon A. Greenblatt, Banco Panamericano, Inc., Loop Corp., Nola L.L.C., Repurchase Corp.,

Defendants.

ADV. No. 03-4053 (RJK)

The Trustee's Motion for Sanctions against Leon A. Greenblatt, Banco Panamericano, Inc. ("Banco"), Loop Corp ("Loop"), and Nola L.L.C. (collectively "Defendants")[1] should be denied because the Motion improperly seeks sanctions for Defendants' inability to produce documents that either no longer exist or are not within their possession or control. The Trustee's Motion contends that two categories of documents have not been produced: (1) the "gaps" in the bank statements of Banco and Loop; and (2) the records relating to the real property located at 2350 North Lincoln Park West, Chicago, IL. Because Defendants' production with respect to these documents is complete, the Trustee's motion should be denied.

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[1] The Trustee does not seek relief against Repurchase Corporation.

A. The "Gaps" in the Bank Statements

The Trustee contends that sanctions should be imposed on Defendants because there are "gaps" in their production of bank statements. Defendants have produced all responsive documents they have and the motion should be denied.

As a preliminary matter, counsel for the Trustee raised the issue of these missing statements for the first time in a telephone conversation on June 8, 2004, even though the statements had been produced in March of 2004. In that June conversation, the Trustee was advised that such "gap" statements are *not* documents "in the possession or control of or which are accessible to any servant, employee, representative, or agent," as the Trustee's requests directed. Defendants' counsel offered, however, to contact the banks to obtain the "gap" statements. Grassley Aff., Ex. C. The Trustee's counsel *rejected* this offer, choosing instead to address this matter to the Court. Sanctions should not be based on rejected offers to produce the documents at issue, especially where there is no evidence of bad faith on Defendants' part. *Hairston v. Alert Safety Light Products, Inc.*, 307 F.3d 717, 718-19 (8th Cir. 2002) (holding that while discovery sanctions are within court's discretion, "discretion is bounded by the requirement ... that the sanction be just and relate to the claim at issue in the order to provide discovery").

In addition, the Trustee's assertion that despite the fact that the statements are not in the possession or control of the Defendants, they have an obligation to secure the statements from third parties, is not consistent with case law interpreting Fed. R. Civ. P. 34. To begin with, the burden is on the party seeking discovery to make a showing that the other party has control over the materials sought. *E.g., Securities and Exchange Comm'n v. Credit Bancorp, Ltd.*, 194 F.R.D. 469, 472 (S.D.N.Y. 2000). Mr. Greenblatt's affidavit explains that with respect to the Banco and Loop accounts, Banco and Loop have produced all documents they have. Greenblatt Aff. ¶¶ 1-2. Moreover, these accounts are no longer active; hence, Defendants are in no better position than

the Trustee to obtain these records. *See Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427 (7th Cir. 1993) ("But the fact that a party could obtain a document if it tried hard enough and maybe if it didn't try hard at all does not mean that the document is in its possession, custody, or control; in fact it means the opposite."). And the Trustee does not claim that he took any action to secure these documents himself. The Trustee could have sent a subpoena to these institutions, but chose not to. Because the documents are equally available to either the Trustee or Defendants from third parties, sanctions for non-production are inappropriate here.

B. <u>The 2350 North Lincoln Park West Property</u>

The Trustee contends that Mr. Greenblatt should be sanctioned for failing to provide documentation related to two condominium units. Mr. Greenblatt has no responsive documents, and thus the motion should be denied.

The Trustee contends that "Counsel for Defendants admits that Mr. Greenblatt owns the aforementioned condominium." (Trustee Mem. at 6-7, ¶17.) Contrary to the Trustee's contention, the property is *not* owned by Mr. Greenblatt, and the letter from counsel for Defendants (on which Ms. Grassley's affidavit purports to rely) specifically addresses these ownership issues. The 2350 North Lincoln Park West property is comprised of two units, and as discussed below, each unit has different ownership.

The first unit, Unit 2S, as reflected in the Recorder of Deed information attached to Ms. Grassley's affidavit, is the marital homestead property of Mr. Greenblatt and his wife held tenancy by the entirety. Tenancy by the entirety is unlike joint tenancy in that an estate is created, and the property in that estate cannot be sold to satisfy the debt of only one spouse. 765 ILCS 1005/1c; *Premier Property Management, Inc. v. Chavez*, 728 N.E.2d 476, 479 (Ill. 2000) (tenancy by the entirety "is an estate in real property" and "[o]nly spouses may hold property in this estate"). Because the marital estate owns Unit 2S, Mr. Greenblatt does *not* own that parcel

"individually, jointly, or beneficially," as specified in the Trustee's document request. Notwithstanding the inapplicability of the Trustee's request to Unit 2S, counsel for Defendants advised the Trustee that Mr. Greenblatt's documents relating to this Unit no longer existed because they were destroyed in a fire in the Unit several years ago. Mr. Greenblatt's Affidavit attests to the non-existence of these documents. Greenblatt Aff., ¶ 3. Despite these facts, the Trustee baldly contends that "Mr. Greenblatt is not relieved of his obligation to retrieve such copies simply because his personal copies may have been destroyed." Yet the Trustee cites no authority for the proposition that destroyed documents must be recreated, and case law is to the contrary: "A party cannot reasonably be ordered to produce what does not exist." *In Re Control Data Corp. Sec. Litig.*, No. 3-85-1341, 1987 U.S. Dist. LEXIS 16829, * 18 (D. Minn. December 10, 1987) (attached); *see also Searock v. Stripling*, 736 F.2d 650, 654 (11th Cir. 1984) (finding abuse of discretion to dismiss counterclaim where noncompliance was due to inability, after a good faith effort, to obtain requested documents).

As to the second unit, Unit 3S, this property is owned by a trust to which Mr. Greenblatt is neither the Trustee nor the beneficiary, a fact related to the Trustee by counsel for the Defendants' July 7, 2004, letter, and confirmed here by Mr. Greenblatt's Affidavit. Greenblatt Aff. ¶ 3. Because Unit 3S is not real property owned "individually, jointly, or beneficially" by Mr. Greenblatt, any documents relating to this Unit would not be responsive to the Trustee's requests.

CONCLUSION

For all of the foregoing reasons, Defendants request that the Trustee's Motion for Sanctions be denied.

Respectfully submitted,

BRIGGS AND MORGAN, P.A.

By: _____

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Dated: October 29, 2004

LEXSEE 1987 US DIST LEXIS 16829

In Re Control Data Corporation Securities Litigation

Master Docket 3-85-1341

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

1987 U.S. Dist. LEXIS 16829; Fed. Sec. L. Rep. (CCH) P93,720

December 10, 1987, Decided

SUBSEQUENT HISTORY: [*1] Adopting Order of February 22, 1988, Reported at: *1988 U.S. Dist. LEXIS 18603.*

DISPOSITION: Plaintiffs' motion to compel responses to written discovery from defendant Peat Marwick & Main GRANTED in part and DENIED in part.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff shareholder class sought to compel responses to written discovery requests from defendant accounting firm in their action alleging securities fraud against defendant company.

OVERVIEW: The accounting firm argued that discovery should be confined to the accounting events alleged by the shareholder class as the basis for their fraud claim. The court held that all responsive materials to a discovery request must be searched for and produced, notwithstanding the objections based on the time frames. The court refused to recognize an accountant-client privilege to provide a confidentiality protection against the disclosure of financial workpapers. Further, limited disclosure failed to satisfy the purpose of examining the integrity of the accounted work. There also was no rule that fixed the time frame for discovery in class action litigation. The court also found that pre-offer statements, conduct, and documents were admissible as evidence on the issue of scienter, intent, and knowledge, as were post-offer statements, conduct, and documents. The court found that the shareholder class's request for documents was relevant under *Fed. R. Civ. P. 26(b)*, and that the proper remedy for an objection to a discovery request or for the protection of any private interest was a *Fed. R. Civ. P. 26(c)* protective order.

OUTCOME: The court granted the shareholder class's motion to compel discovery except for discovery of the accounting firm's document destruction policy.

LexisNexis(R) Headnotes

Civil Procedure > Disclosure & Discovery > Mandatory Disclosures
Civil Procedure > Disclosure & Discovery > Relevance
[HN1] The intent of *Fed. R. Civ. P. 26* is to allow discovery into all matters, which are reasonably calculated to lead to admissible evidence. A party is allowed to fully explore the facts so as to permit a reasoned, informed presentation of its proof at trial. Latitude during discovery is essential to that end. However, when the affairs of several multinational corporations are in issue, the potential for wasteful and abusive over-discovery is heightened. Simply because a multinational corporation is a named defendant, it is not to be subjected to exploration of its business activities unless they are relevant to the litigation. The parties have obligations to so confine their discovery, and the responsibility is on the court to prohibit over-discovery.

Securities Law > Bases for Liability > Deceptive Devices
[HN2] The essential elements of a private securities fraud claim pursuant to Securities and Exchange Commission Rule 10b-5 are well defined. In order to succeed on their claim, plaintiffs must prove: (1) that defendants engaged in a scheme to defraud, or made misrepresentations or omissions of material fact or

engaged in such practices that amounted to fraud or deceit, (2) that they did so with scienter, that is, an intent to deceive, (3) that they did so in connection with the purchase or sale of securities, (4) that damages were suffered by plaintiffs, and (5) that the damages were caused by defendants conduct (often determined by issues of plaintiffs' reliance on, or the materiality) of the representation or conduct.

Civil Procedure > Disclosure & Discovery > Relevance
Securities Law > Bases for Liability > Liability for Fraud
[HN3] In securities fraud litigation, the post-offering statement, documents, or conduct are treated as admissible evidence on the issue of scienter, intent, and knowledge. Likewise, pre-offering statements, conduct, and documents are relevant to these issues.

Civil Procedure > Class Actions > Prerequisites
Civil Procedure > Disclosure & Discovery
[HN4] There is no rule fixing discovery in class-action litigation to the class period.

Civil Procedure > Disclosure & Discovery > Relevance
Securities Law > Bases for Liability > Deceptive Devices
[HN5] A detection of any financial deficits which prompted conduct of concealment is surely relevant and essential to proof of plaintiffs' theory.

Civil Procedure > Discovery Methods > Requests for Production & Inspection
[HN6] In order to resolve a discovery dispute, the court may properly narrow the scope of a discovery request.

Civil Procedure > Disclosure & Discovery > Privileged Matters
[HN7] There is no recognized accountant-client privilege, which would provide a confidentiality protection against disclosure of financial workpapers. Piecemeal or limited disclosure of workpapers fails to satisfy the purpose of examining the integrity or accuracy of the accounting work.

Civil Procedure > Disclosure & Discovery > Protective Orders
[HN8] While the courts have recognized a privacy interest in an individual's personnel files, the proper remedy for protection of that interest in civil discovery is the entry of a *Fed. R. Civ. P. 26(c)* protective order.

Civil Procedure > Disclosure & Discovery > Protective Orders
[HN9] Any employee interest in the privacy of personnel records may be overridden by the need for discovery, but is protectible upon application for a protective order limiting the use of the information.

Civil Procedure > Disclosure & Discovery > Protective Orders
[HN10] A confidentiality objection is a matter for protective order, and does not obviate the obligation to respond.

Civil Procedure > Disclosure & Discovery > Undue Burden
[HN11] *Fed. R. Civ. P. 26(b)(2)* expressly provides that the existence and contents of any insurance agreement that may satisfy all or part of a judgment which may be entered in the action is discoverable.

Civil Procedure > Disclosure & Discovery > Privileged Matters
[HN12] Absent some showing that evidence is being destroyed, discovery of a documents destruction policy is uncalled for.

Civil Procedure > Discovery Methods > Requests for Production & Inspection
[HN13] A party is obliged to respond to a discovery request even if another party is likely to have the items sought. It cannot pass its obligation to respond to another, and every requested document which is in its possession must be produced, notwithstanding actual or potential production from another source.

Civil Procedure > Discovery Methods > Requests for Production & Inspection
[HN14] A party cannot reasonably be ordered to produce what does not exist. However, in a manner which it can be legally bound, it must formally answer that no such documents exist.

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JUDGES: JANICE M. SYMCHYCH, United States Magistrate.

OPINIONBY: JANICE M. SYMCHYCH

OPINION:

ORDER

The above matter was before the undersigned on July 8, 1987 upon class plaintiffs' motion to compel responses to written discovery from defendant Peat Marwick & Main (PMM). The class was represented by Leonard Barrack, Esq., Karl Cambronne, Esq., and Robert Hoffman, Esq. PMM was represented by Elliot Kaplan, Esq. and Linda Foreman, Esq. The Control Data (CDC) defendants were represented by Steven Olson, Esq. and Michael Bleck, Esq. Since the time of hearing, the parties have made additional written submissions on the discovery items in issue, and the dispute [*2] is now ready for disposition.

FACTUAL AND PROCEDURAL BACKGROUND

In order to responsibly determine the discovery motion, the allegations present in this litigation must be specifically considered.

The certified class consists of CDC shareholders who made their purchases between January 7, 1985 and August 6, 1985. They allege that the price of CDC stock was unlawfully inflated during the class period, due to material misrepresentations about CDC's financial health in three financial documents -- the 1984 10K filing with the Securities and Exchange Commission (SEC), the 1984 annual shareholder report, and the 1985 unaudited second quarter financial statement. In the complaint, and throughout the proceedings, the class has pointed to three specific accounting transactions appearing in these documents, constituting the misrepresentation. First, is the use of a $ 16.8 million net operating loss (NOL) carryforward, which the class asserts could not properly be claimed unless CDC was sure beyond a reasonable doubt that it would have future profits against which to offset the NOL. The class plaintiffs rely, inter alia, on published accounting standards and correspondence from the SEC, [*3] for the claim that the NOL was improperly taken. Second, the class urges that a $ 9.7 million loss was improperly charged against retained earnings of a CDC subsidiary rather than against CDC's net income, in contravention of separate published accounting standards. Third, it claims that about $ 8.6 million in losses from two subsidiaries were omitted from CDC's second quarterly financial statement in 1985. The effect of this conduct, assert the class plaintiffs, was to dishonestly create the impression that CDC had 1984 net earnings of $ 31.6 million, when in fact they were $ 5.1 million, and that 81 cents on the share had been earned, when in fact 12 cents had. For the second quarter of 1985, plaintiffs assert, CDC improperly reported a $ 3.8 million profit, when it in fact suffered a $ 4.8 million loss. On August 6, 1985, the SEC required CDC to restate its financials, reflecting the above. The plaintiffs assert that upon this announcement, the price of CDC shares plummeted, causing them substantial loss. The court has certified the class on its federal claims of violation of the antifraud provisions of the securities laws under SEC Rule 10(b)(5). The pendent state claims [*4] have not been so certified.

After a period of discovery pertaining to class certification issues, the parties have commenced discovery regarding the merits of these claims. In issue here is plaintiffs' first set of Rule 34 document requests, served on PMM in the summer of 1986. Documents were served in response during December, 1986. A dispute about the sufficiency of the response ensued, and reached the court in July, 1987. Despite plaintiffs' treatment of the motion to compel in terms of five general issues, a review of the briefs, document requests and responses thereto, and the supplementary submissions, makes it clear that such generalized treatment would not adequately resolve the discovery dispute. For instance, the validity of confidentiality objections will vary depending on the nature of the documents sought in any given document request. This same truism applies with respect to relevancy issues. No broad statement of relevancy will adequately resolve which documents must, and which need not, be produced.

DISCUSSION

Relevancy in General

The parties seriously disagree about the allowable scope of discovery. PMM, during argument and in its July 22, 1987 letter brief [*5] regarding this issue, seeks to confine discovery to the three accounting events alleged by plaintiffs as their basis for a claim of fraudulent omission, and to the time period of class certification. It has agreed to provide documents for an additional period, not past December 31, 1985. PMM contends that it has already produced all responsive documents, when the scope of allowable discovery is thus defined.

This is too cramped a view of what is discoverable in an action such as this. As has been often stated, [HN1] the intent of *FRCP 26* is to allow discovery into all matters which are reasonably calculated to lead to admissible evidence. *Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 57 L. Ed. 2d 253, 98 S. Ct. 2380 (1978); Hickman v. Taylor, 329 U.S. 495, 501, 91*

L. Ed. 451, 67 S. Ct. 385 (1947); Dabney v. Montgomery Ward & Co., Inc., 761 F.2d 494, 499 (8th Cir. 1985). A party is allowed to fully explore the facts so as to permit a reasoned, informed presentation of its proof at trial. Latitude during discovery is essential to that end. However, when, as here, the affairs of several multinational corporations are in issue, the potential for wasteful and abusive overdiscovery [*6] is heightened. Simply because a multinational corporation is a named defendant, it is not to be subjected to exploration of its business activities unless they are relevant to the litigation. The parties have obligations to so confine their discovery, and the responsibility is on the court to prohibit overdiscovery. *Herbert v. Lando, 441 U.S. 153, 177, 60 L. Ed. 2d 115, 99 S. Ct. 1635 (1979);* Oppenheimer, at 351.

With these axiomatic principles in mind, the substantive law must be examined, before relevancy issues are decided. In this circuit, [HN2] the essential elements of a private securities fraud claim pursuant to Rule 10b-5 are well defined. In order to succeed on their claim, plaintiffs must prove:

> (1) that defendants engaged in a scheme to defraud, or made misrepresentations or omissions of material fact or engaged in such practices that amounted to fraud or deceit;
>
> (2) that they did so with scienter, that is, an intent to deceive;
>
> (3) that they did so in connection with the purchase or sale of securities;
>
> (4) that damages were suffered by plaintiffs; and
>
> (5) that the damages were caused by defendants conduct (often determined by issues of [*7] plaintiffs' reliance on, or the materiality) of the representation or conduct.

Forkin v. Rooney Pace, Inc., 804 F.2d 1047, 1049 (8th Cir. 1986); Harris v. Union Electric Co., 787 F.2d 355, 362 (8th Cir. 1986).

Time Period

Although the class period here is short and definite, it does not determine the period of relevancy for discovery purposes. There are numerous instances [HN3] in securities fraud litigation where post-offering statement, documents, or conduct have been treated as admissible evidence on the issue of scienter, intent, and knowledge. E.g. *Michaels v. Michaels, 767 F.2d 1185, 1195 (7th Cir. 1985); S.E.C. v. Holschuh, 694 F.2d 130, 143 (7th Cir. 1982); Quintel Corp. v. Citibank, N.A., 596 F. Supp. 797, 804 (S.D. N.Y. 1984); State Teachers Retirement Board v. Fluor Corp., 589 F. Supp. 1268, 1272 (S.D. N.Y. 1984).* Likewise, pre-offering statements, conduct, and documents have been found relevant to these issues. E.g. *Austin v. Loftsgaarden, 675 F.2d 168, 180 (8th Cir. 1982);* Holschuh, at 143; State Teachers Retirement Board, at 1275; *Clairdale Enterprises v. C.I. Realty Investors, 423 F. Supp. 257, 260 (S.D. N.Y. 1976).* Because [*8] the intent of both PMM and CDC, behind the handling of these accounting transactions, is in issue in this case, there cannot be a time-frame limit on discoverable facts. Although PMM relies on the certified class period as the relevant time frame, [HN4] there is no rule fixing discovery in class-action litigation to the class period. *National Organization For Women, Inc. v. Minnesota Mining and Manufacturing, 73 F.R.D. 467, 472 (D.C. Minn. 1977).*

For these reasons, all of PMM's objections to plaintiffs' document requests on the grounds that they seek materials either before or January 7, 1985 and after December 31, 1985 are overruled. All responsive materials must be searched for and produced, notwithstanding the objections based on time frame.

Other Financial Matters

The major remaining dispute pertains to the degree of allowable exploration into CDC's overall financial health and other specific financial events at the time of the three accounting occurrences in issue. Plaintiffs, for example, seek documents relating to CDC's stature with its lenders at the time involved (D.R. # 11 and 12), its ability at the time to sustain its research and development operations (D.R. # 20), [*9] its dividend increase in April, 1985 (D.R. # 23), and restructuring of specific operations (D.R. # 27). This parcel of documents requests does fairly bear on the issues raised in this litigation, for discovery purposes. Plaintiffs maintain that CDC and PMM engaged in accounting maneuvers in order to conceal financial troubles from shareholders and potential shareholders. [HN5] A detection of any financial deficits which prompted such conduct is surely relevant and essential to proof of plaintiffs' theory. Plaintiffs are entitled to explore whether CDC offset deficits in seemingly unrelated divisions or operations through the allegedly deceptive accounting transactions involved in this case. *C.f. Moore v. Fenex, Inc., 809 F.2d 297, 302 (6th Cir. 1987); Sirota v. Solitron Services, Inc., 673 F.2d 566, 573 (2nd Cir. 1982); Alna Capital Associates v. Wagner, 532 F. Supp. 591, 598-99 (S.D. Fla. 1982);* affrm'd in part and revs'd in part, *758 F.2d 562 (11th Cir. 1985); Herzfeld v. Laventhol, et al.,*

378 F. Supp. 112, 122-123 (S.D. N.Y. 1974), affrm'd in part and revs'd in part, *540 F.2d 27 (2nd Cir. 1976).*

For these reasons then, those documents requests directed to CDC's overall [*10] financial condition must be answered. They include the following disputed items. DR # 9, 11, 12, 20, 23, 24, 27, 28, 29, 30 and 35. As framed, and given the prior ruling as to the relevant time period, however, these requests are overbroad. [HN6] In order to resolve a discovery dispute, the court may properly narrow the scope of a discovery request. *Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 559 (7th Cir. 1984); Jepsen v. Florida Board of Regents, 610 F.2d 1379, 1384 (5th Cir. 1980); Ross v. Bolton, 106 F.R.D. 22, 23 (S.D. N.Y. 1985); Edwards v. Gordon & Co., 94 F.R.D. 584, 585-86 (D. D.C. 1982).* Here, these requests as to the corporation's financial condition are judicially narrowed to the period from the class period up until December 31, 1985, and any documents responsive to each of these requests which were generated thereafter and relate directly or indirectly to the truthfulness of the three financial documents in issue.

PMM Workpapers

Plaintiffs had sought production of all PMM workpapers pertaining to accounting or auditing done on behalf of CDC. It also sought by way of interrogatory, an itemized description of all engagements of PMM by CDC. PMM had [*11] refused to answer such a query, but was ordered to do so at the July 8, 1987 hearing. It honored the oral order by making a written response, and plaintiffs have now formally narrowed their request for production of PMM workpapers, by letter dated July 28, 1987. Therefore, the motion to compel an answer to Interrogatory 18(a) and (b) has been mooted. What now remains is the question of the documents requests seeking more limited portions of the workpapers.

At the outset, it must be noted that [HN7] there is no recognized accountant-client privilege which would provide a confidentiality protection against disclosure of these workpapers. *United States v. Arthur Young & Co., et al., 465 U.S. 805, at 817, 79 L. Ed. 2d 826, 104 S. Ct. 1495 (1984).* It is generally the case that piecemeal or limited disclosure of workpapers fails to satisfy the purpose of examining the integrity or accuracy of the accounting work. *Fein v. Numex Corp., 92 F.R.D. 94, 96 (S.D. NY 1981);* and Seidman v. Stauffer Chemical Co., Civ. B-84-543 (D. Conn. Sept. 30, 1985), appended to plaintiffs' brief. Especially with plaintiffs' elimination of wholly irrelevant engagements from this request, there is no meritorious [*12] overall objection to the production of the workpapers sought by D.R. 33.

There are more limited disputes, however, about one engagement sought by plaintiff and objected to by PMM, and about two categories of documents enumerated on D.R. # 33 for each engagement. First, the disputed engagement concerns 18A.7 in PMM's list of engagements. It deals with PMM's work for CDC on employee stock option plans. PMM claims that this engagement is irrelevant to the issues. Because accounting papers on stock option plans may include raw data as to valuation or projected valuations of stock, cost and benefit analyses of offering employees more or less by way of stock options, and possible alternative offerings with comparative financial consequences, it is quite clear that this engagement is relevant within the meaning of *FRCP 26(b).* The documents must be provided.

For each engagement, plaintiffs seek production of a series of enumerated documents. Included are categories (dd) and (ee) of D.R. # 33, which PMM contends are not discoverable. The former requests internal PMM reports or evaluations of PMM employees regarding each engagement; the latter requests peer review-type data regarding PMM employees' [*13] performance on the obligation. Defendant argues that such records are irrelevant and that production would be an invasion of the employee's privacy. Both have a bearing on the competency with which CDC engagements were handled, and will help to elucidate whether individual judgments versus patterns of corporate conduct were at the root of the claimed accounting errors. Such documents can also shed light on whether the corporation saw fault with its own performance. Therefore, these categories of documents shall be produced for each of the engagements to be disclosed. *In re Hawaii Corp., 88 F.R.D. 518, 522* (D. Hawaii, 1980). The invasion of privacy argument against such production is without merit. No cognizable privilege is claimed. [HN8] While the courts have recognized a privacy interest in an individual's personnel files, the proper remedy for protection of that interest in civil discovery is the entry of a Rule 26(c) protective order. Compagnie Francaise d' *Assurance Pour Le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 40 (S.D. N.Y. 1984); In re Dayco Corporation, 99 F.R.D. 616, 624 (S.D. Ohio 1983);* In re Hawaii, at 522; In re Equity Funding Corporation, [*14] M.D.L. No. 142 (C.D. Ca., Order dated October 24, 1985).

For the same reasons, any documents responsive to D.R. 16 and 19 also must be produced. They seek any documents in PMM's hands regarding discipline of CDC employees, at all levels, and evaluations of and inquiries regarding the competency of CDC employees. If judicially narrowed to cover discipline and evaluations which relate directly or indirectly to the truthfulness of the three financial documents in issue, regardless of the time when the document sought was generated, these items are of clear relevancy for discovery purposes.

Again, the competence of employees in handling the financial disclosures of a company whose securities offering is under attack, can tend to either negate or establish the liability of the company under the securities laws. In re Hawaii, at 522. Therefore, [HN9] any employee interest in the privacy of such records is overridden by the need for discovery, and is protectible upon application for a protective order limiting the use of the information.

Internal PMM Documents

Plaintiffs seek production of a number of documents regarding PMM's internal controls and policies on accounting practices, and [*15] also its internal documents on the CDC matter. With one exception, all will be compelled. D.R. 34 seeks PMM policy materials on the handling of post-audit reviews. It seeks such things as its internal professional literature, guidelines, and manuals. PMM has not provided any itemization of documents withheld on the grounds that these things are confidential trade secrets. Instead, it has interposed a blanket-style objection. The objection is overruled. *Lewis v. Capital Mortgage, 78 F.R.D. 295, 311 (D. Md. 1978), Rosen v. Dick, 1975 U.S. Dist. LEXIS 13739, 20 Fed. R. Serv. 2d (Callaghan) 471 (S.D. N.Y. 1975).* In addition, a number of unpublished slip opinions which are in accord, and are attached to plaintiffs' Narkin affidavit, support this conclusion. Here, as in those cases, plaintiffs are entitled to learn whether PMM's own yardsticks are adequate, and second, whether PMM's employees performed according to them. Again, any objection is properly remedied only by a protective order.

Plaintiffs in D.R. # 18, 38, and 39 seek internal PMM matters regarding the disputed CDC accounting. Respectively, they seek: any opinion letters, management letters or special studies regarding the events in question, by PMM, CDC, or others; [*16] internal PMM communications as to CDC and performance of SEC-related work, riskiness of the client, and nature of the work accomplished; and items pertaining to PMM's, or CDC's "due diligence" regarding the SEC filings. PMM's answers to these document requests are improperly evasive; they also provide partial responses and purport to narrow the requests according to PMM's perceptions of relevancy. They are coupled with objections of confidentiality, vagueness, and irrelevancy. [HN10] The confidentiality objection again is a matter for protective order, and does not obviate the obligation to respond. These three document requests, as drafted, are understandable and amenable to response without unnecessary guesswork as to what is intended. On their faces, and in view of the foregoing discussion on this motion, they call for relevant documents. The objections are overruled.

Last, plaintiffs seek PMM's insurance policy (D.R. 41) and its internal policy as to document destruction (D.R. 42). [HN11] *Rule 26(b)(2), Fed.R.Civ.P.*, expressly provides that the existence and contents of any insurance agreement that may satisfy all or part of a judgment which may be entered in the action is discoverable. [*17] Oppenheimer, at 352; *Simon v. G.D. Searle & Co., 816 F.2d 397, 404 (8th Cir. 1987).* The motion to compel a response to D.R. 41 is therefore, granted.

The documents destruction policy, however, should not be discoverable. There is no reason to believe that the nonproduction of documents here relates either to the intentional or course-of-business destruction of documents. The above discussion encapsulates the history and scope of the documents production dispute. [HN12] Absent some showing that evidence is being destroyed, this sort of discovery is uncalled for. As a result, the motion to compel a response to D.R. 42 is denied.

Miscellaneous

A good number of the document requests in issue were answered in part by PMM with an objection that the items were apparently sought from others. That is not the case. Each and every request in issue was directed specifically to PMM. [HN13] It is obliged to respond even if another party is likely to have the items sought. It cannot pass its obligation to respond to another, and every requested document which is in its possession must be produced, notwithstanding actual or potential production from another source. *Pennwalt Corp. v. Plough, Inc.,* [*18] *85 F.R.D. 257, 263 (D. Del. 1979); Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73, 76 (D. Mass. 1976).*

In its briefs to the court, PMM has indicated that it could find no responsive documents to certain requests. [HN14] A party cannot reasonably be ordered to produce what does not exist. *Searock v. Stripling, 736 F.2d 650, 654 (11th Cir. 1984); SEC v. Canadian Javelin, Ltd., 64 F.R.D. 648, 651 (S.D. N.Y. 1974); Wm. A. Meier Glass Co. v. Anchor Hocking Glass Corp., 11 F.R.D. 487, 491 (W.D. Pa. 1951).* However, in a manner which it can be legally bound, it must formally answer that no such documents exist. Therefore, even if there are document requests where nothing is produced, PMM must serve proper formal responses, so stating. *Laker Airways Ltd. v. Pan American World Airways, 103 F.R.D. 42, 46 (D. D.C. 1984); Alexander v. Parsons, 75 F.R.D. 536, 538 (W.D. Mich. 1977).*

Last, two documents requests call for narrowing because, on their faces, they intrude too broadly into the highest decision making levels of CDC on irrelevant matters. In D.R. 21 plaintiffs seek documents

disseminated by PMM to the CDC board or its committees. Obviously, the request should be confined [*19] to documents relevant to the issues in this case, excluding other dealings that PMM may have had with the CDC board. Likewise, in D.R. 22 seeks all documents in PMM's possession regarding CDC board meetings. It should be similarly limited. Plaintiffs will be allowed leave to suitably narrow these two document requests, which shall then be honored.

Therefore, based upon the foregoing, the briefs and arguments of counsel, and all the files and proceedings herein,

IT IS HEREBY ORDERED that:

1. Plaintiffs' motion to compel responses to document requests 6, 7, 8, 9, 10, 11, 12, 16, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30, 34, 35, 38, and 39, as narrowed herein, is GRANTED;

2. Plaintiffs' motion to compel responses to document request 33, as narrowed by the plaintiff and the court, is GRANTED;

3. Plaintiffs' motion to compel a response to document requests 41 and 42 is DENIED;

4. The parties shall submit, by December 30, 1987, an agreed form of protective order, protecting defendants' claims of confidentiality, or in the event they cannot agree, their separate proposals on the disputed terms of such an order;

5. The responses compelled herein shall be served upon plaintiff within [*20] 45 days hereof.

DATED: December 10, 1987.

JANICE M. SYMCHYCH

United States Magistrate

103VQH

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